IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 14, 2005 Session

RUSKIN A. VEST, JR., ET AL. v. DUNCAN-WILLIAMS, INC.

Appeal from the Circuit Court for Maury County
No. 10387 Jim T. Hamilton, Judge

No. M2005-00466-COA-R3-CV - Filed on August 3, 2006

After Court of Appeals on interlocutory appeal affirmed denial of the first request, the trial court dismissed appellants' second motion to compel arbitration on the basis the evidence supporting the second motion was not newly discovered evidence. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which ROBERT WEDEMEYER and FRANK G. CLEMENT, JR. JJ., joined.

Allan J. Wade, Lori Hackleman Patterson, Brandy S. Parrish, Memphis, Tennessee, for the appellant, Duncan-Williams, Inc.

H. Naill Falls Jr., Nashville, Tennessee, for the appellees, Ruskin A. Vest, Jr. and Industrial Products Co., Inc.

OPINION

This is the second interlocutory appeal[1] brought by Duncan-Williams, Inc. ("Duncan-Williams") in its attempt to compel arbitration in this matter on the ground that it is a third-party beneficiary of a contract requiring arbitration of disputes.

Duncan-Williams asserted this position for the first time in July 2003, when it filed a motion to dismiss alleging that because arbitration was required, the trial court was deprived of its subject matter jurisdiction. This motion was denied by the trial court in October 2003. Duncan-Williams

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[1] As discussed in this opinion, neither this appeal nor the earlier one was a discretionary interlocutory appeal pursuant to Tenn. R. App. P. 9. Because, however, the underlying lawsuit was still proceeding, we will refer to them as interlocutory.

then filed an interlocutory appeal to this court pursuant to Tenn. Code Ann. § 29-5-319(a)(1).[2] During the pendency of this first appeal, the trial court allowed discovery to proceed but only to the extent permitted in arbitration.

On May 4, 2004, the Court of Appeals affirmed the trial court's decision to decline to dismiss the lawsuit or to compel arbitration of the dispute between these parties. We refer to the opinion styled *Vest v. Duncan-Williams, Inc.*, No. M2003-02690-COA-R3-CV (Tenn. Ct. App. May 4, 2004), for a thorough recitation of the dispute between the parties. For purposes of the appeal now before us, the primary points are: (1) the account agreements containing the agreement to arbitrate were between plaintiffs and another party (a clearing broker), and Duncan-Williams was not a party to those agreements; (2) Duncan-Williams argued that it was a third-party beneficiary of the agreement; and (3) the contract was subject to Wisconsin law.

The Court of Appeals held that Duncan-Williams had the burden of proving, under Wisconsin law, that the parties to the agreements entered into the account agreements "directly and primarily" for the benefit of Duncan-Williams. *Id.* at *5. The appellate court also found that Duncan-Williams had not provided any evidence regarding the relationship between the parties that would meet that burden. *Id.* In other words, the court upheld the trial court's denial of the motion to dismiss and/or compel arbitration since the record did not show that the arbitration agreement at issue was intended to benefit Duncan-Williams. The case was then remanded to the trial court, where discovery proceeded.

After remand, Duncan-Williams filed a Motion to Compel Arbitration on December 21, 2004, attaching two affidavits attempting to correct the absence of evidence noted by the Court of Appeals and to establish the requisite intent to include Duncan-Williams as a third-party beneficiary in the arbitration agreement. The trial court denied Duncan-Williams' motion to compel, finding:

> The Motion to Compel Arbitration should not be granted. The Tennessee Court of Appeals affirmed the Court's earlier decision denying defendant's first Motion to

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[2] In both its Brief and its Motion to Stay Discovery Pending Appeal, Duncan-Williams expressly acknowledges that its first interlocutory appeal was pursuant to Tenn. Code Ann. § 29-5-319. That statute governs appeals under Tennessee's Uniform Arbitration Act and provides:

> (a) An appeal may be taken from:
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> (1) An order denying an application to compel arbitration made under § 29-5-303;
> (2) An order granting an application to stay arbitration made under § 29-5-303(b);
> (3) An order confirming or denying confirmation of an award;
> (4) An order modifying or correcting an award;
> (5) An order vacating an award without directing a re-hearing; and
> (6) A judgment or decree entered pursuant to the provisions of this part.
>
> (b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

> Compel Arbitration. This issue may not be reconsidered by the Court unless defendant submits new evidence that was not available when its earlier Motion was filed. Defendant has not offered any such evidence. Defendant's new Motion relies only on proof that was clearly available when the first arbitration Motion was filed. Another reason the Court cannot grant this Motion is that defendant has failed to meet the factual standard required by Wisconsin law, which is controlling under the BNY Customer Account Agreement.
>
> Duncan-Williams is not a party to that agreement and cannot attempt to enforce its arbitration clause unless defendant proves that the agreement was entered into "directly and primarily" for the benefit of Duncan-Williams. This has not been done.

Duncan-Williams then brought this interlocutory appeal of the trial judge's second refusal to require arbitration pursuant to Tenn. Code Ann. § 29-5-319.

The dispositive question presented is whether a party may seek to compel arbitration after its initial motion to compel has been denied, and that denial affirmed on appeal, without a showing that the new motion is based on newly discovered evidence. We conclude the answer to that question is no.

Duncan-Williams characterizes its second motion to compel with the supporting affidavits as consistent with the law of the case established by the Court of Appeals and as "following the direction of the appellate opinion." We respectfully disagree with the implication that the appellate court directed the submission of additional evidence. This court did not vacate the trial court's denial of the motion to compel and remand for further evidence or proceedings on that issue. Instead, we reviewed the order denying the motion to compel based on the record presented and affirmed the trial court.

The concept of law of the case, however, is related to principles guiding us in resolving the issue before us in that that principle encompasses the concept of finality. The "law of the case" doctrine is a longstanding discretionary rule of judicial practice that is based on the common sense recognition that issues previously litigated and decided by a court of competent jurisdiction ordinarily need not be revisited. *Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83, 90 (Tenn. Ct. App. 1996). The doctrine generally prohibits reconsideration of issues that have already been decided in a prior appeal of the same case if the facts are essentially the same. *State v. Carter*, 114 S.W.3d 895, 902 (Tenn. 2003), *cert. den.* 540 U.S. 1221, 124 S. Ct. 1511 (2004).[3]

[3] As a general proposition, the "law of the case" forecloses argument on an issue that was previously decided in an appeal of the same case. *State v. Jefferson*, 31 S.W.3d 558, 560-61 (Tenn. 2000). An issue decided in a prior appeal may be reconsidered if (1) there has been an intervening change in the law; (2) the evidence at a hearing after remand was substantially different from the evidence in the first proceeding; or (3) the prior decision was clearly erroneous and would result in manifest injustice if allowed to stand. *Id*.

Duncan-Williams argues there is no prohibition on successive motions to compel arbitration and compares such motions to other types of pre-trial motions. However, that argument fails to recognize an important distinction: *i.e.*, that denials of motions to compel arbitration are immediately appealable under Tenn. Code Ann. § 29-5-319(a)(1), unlike other interlocutory orders.

Orders that are not judgments resolving all the claims as to all the parties generally are "subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties." Tenn. R. Civ. P. 54.02; Tenn R. App. P. 3(a). One exception to that rule is an order disposing of some of the claims or some of the parties which a trial court has directed be entered as a final judgment pursuant to Tenn. R. Civ. P. 54.02. Tenn. R. App. P. 3(a). Another is an order that is the subject of a Tenn. R. App. P. 9 interlocutory appeal granted by the appellate court. *Id.*

An order denying a motion to compel arbitration is also an exception to the general rule set out in Tenn. R. Civ. P. 54.02 regarding revision before "entry of judgment." That is because such an order is a "judgment," as that term is defined in Tenn. R. Civ. P. 54.01, since it is an order from which an appeal lies. Such a judgment is automatically appealable as of right upon entry. Whether or not the consequence of this language in the rule is that a trial court may not revisit its decision to deny a motion to compel arbitration in the absence of Tenn. R. Civ. P. 59 or 60 grounds is not a question we must decide today because that is not the scenario presented.

In the case before us, the denial of the initial motion to compel arbitration was appealed. This court affirmed the trial court's order and issued a judgment and mandate to that effect. Consequently, this court's judgment was not subject to revision by the trial court. Subsequent attempts in the trial court to be relieved from such judgments are governed by Tenn. R. Civ. P. 60.

Federal courts have applied a similar analysis. In *Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060 (9th Cir. 2005), the court considered a "renewed" petition to compel arbitration, noting that no such pleading is recognized in the Federal Rules of Civil Procedure. The court stated it was necessary to properly characterize the motion because finality and judicial efficiency would be compromised if additional "renewed" motions were filed. While finding it unnecessary to decide which rule, Fed. R. Civ. P. 59 or Fed. R. Civ. P. 60, governed consideration of the renewed petition, the court clearly applied one of the standards set out in those rules. *Id*. at 1064. The party filing the renewed petition argued there had been an intervening change in the law since the trial court's earlier denial of its petition to compel arbitration. "The only way Circuit City could have presented this argument to the district court would have been to file a motion for reconsideration under either Rule 59(e) or Rule 60(b) of the Federal Rules of Civil Procedure." *Id*. at 1063-64.

In *Cozza v. Network Associates, Inc.*, 362 F.3d 12 (lst Cir. 2004), the defendant, NAI, filed a motion to compel arbitration, which was denied by the trial court. NAI did not appeal that denial, even though the Federal Arbitration Act specifically authorized appeals of such denials. *Id*. at 14. Instead, six months later, NAI filed in the trial court a motion for reconsideration of its earlier motion to compel arbitration. It then appealed the denial of that motion to reconsider. *Id.*

The appellate court affirmed the denial primarily on the basis that none of the "newly discovered evidence" alleged by NAI supported an order to compel arbitration. *Id*. at 17. However, the court first found that the arguments made by NAI in its appeal were the same arguments it had made in its initial motion to compel arbitration and stated:

> Whatever the merits *vel non* of NAI's argument that another interlocutory appeal should lie from the denial of a motion to compel arbitration based on new evidence, NAI cannot seriously argue any entitlement to bring successive interlocutory appeals based upon the same arguments, nor to appeal arguments which it could have appealed earlier, but did not. NAI's success thus depends on the alleged "newly discovered evidence" supporting these arguments.

Id. at 15-16.

Arbitration is encouraged, in large part, to expedite the resolution of disputes between parties. Successive motions to compel arbitration and successive interlocutory appeals, where there is no significant change in the basis of the arguments, are inconsistent with that goal.

We conclude the trial court applied the correct standard, regardless of whether it characterized the standard as based in Rule 60. Relief from judgment is available under Tenn. R. Civ. P. 60.02(5) on the basis of newly discovered evidence. However, it must be evidence that was not known to the moving party prior to the entry of the judgment and that could not have been known through exercise of reasonable diligence. *Seay v. City of Knoxville*, 654 S.W.2d 397, 399 (Tenn. Ct. App. 1983).

Duncan-Williams does not argue that the affidavits contain newly discovered evidence. They essentially describe the relationship between the parties and the nature of the business transactions underlying the dispute. Consequently, Duncan-Williams has failed to establish a ground under Tenn. R. Civ. P. 60 for relief from the earlier denial of the motion to compel arbitration.

For these reasons, the trial court is affirmed. Costs are taxed against Duncan-Williams, Inc. for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE